IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON, Plaintiff in Error,
vs.
J. L. HAMILTON, Defendant in Error.

No. 3538.

On Writ of Error to the United States District Court, Eastern District of Washington, Northern Division.

Plaintiff in Error's Opening Brief.

JAS. A. WILLIAMS,
DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error.

EMPIRE-PACIFIC PRINTING CO., SPOKANE

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON, Plaintiff in Error,
vs.
J. L. HAMILTON, Defendant in Error.

No. 3538.

On Writ of Error to the United States District Court, Eastern District of Washington, Northern Division.

Plaintiff in Error's Opening Brief.

JAS. A. WILLIAMS,
DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error.

STATEMENT.

This is a companion case, with the one where J. E. Hample is Defendant in Error. The cases, while not consolidated, were tried together, and with one exception the facts in each case are identical. In each case, on trial before the District Court and a jury, Defendants in Error recovered judgment in the sum of $25,109.06 against Plaintiff in Error, from which the writs of error are prosecuted to this court.

E. H. Stanton & Co. was a meat packing corporation located at Spokane; its capital stock consisted of 6,000 shares of the par value of $100 each. Of this stock, Plaintiff in Error and his family owned 2420 2/3 shares. Defendant in Error owned 1093 1/3 shares, and J. E. Hample, the Defendant in Error in the other case before this court, likewise owned 1093 1/3 shares. The remainder of the stock was scattered. Plaintiff in Error resided at Spokane and had, since the organization of the corporation been its president, and in practical control of the business. (Trans. 52, 102.) Defendant in Error and said J. E. Hample resided at Butte, Montana, and once or twice a year would visit the plant, and about the first of each year would receive a statement as to the condition of the business. (Trans. 51, 69.)

On May 8, 1917, Plaintiff in Error gave to Fred B. Grinnell Co., brokers engaged in selling on commission, an option to purchase 5084 1/3 shares of the stock in E. H. Stanton Co. at the price of $220 a share, cash, such option to be exercised within 15 days, and in such agreement agreed to pay a commission of two per cent "for selling stock of E. H. Stanton Co." (Trans. 40.) Within the 15 days mentioned, said Fred B. Grinnell Co. interested Armour & Co., Chicago meat packers, and within said time, Armour & Co. contracted to purchase the stock of Plaintiff in Error and his family, Defendant in Error and said Hample, paying part cash, and the remainder in notes maturing on various dates. The purchase of this stock by Armour & Co. was made through three separate writings, one signed by the Defendant in Error, one signed by said Hample, and one signed by Plaintiff in Error. The contracts with Defendant in Error and Hample were made prior to the contract with Plaintiff in Error. (Trans. 83-84, 90, 106, 116.) The consideration paid Defendant in Error and Hample for their stock, as provided by their written agreements signed by themselves, was $200 a share. (Trans. 48-49, 58.) The written agreement for the purchase of Plaintiff in Error's stock recited a total consideration of $576,400, this amount being paid, part in cash and part in notes. This purchase price paid, or to be paid, Plaintiff in Error amounted to $92,-266.67 in excess of $200 a share for the stock so

sold by Plaitiff in Error and his family, and this lawsuit and the one instituted by Hample arises out of the fact that there was such excess of $92,-266.67. While the contracts made by Armour & Co. with Defendant in Error and said Hample dealt only with the purchase of their stock, yet the contract made by Armour & Co. with Plaintiff in Error dealt with other subjects, and the purchase price of $576,400 was paid, not only in consideration of the 2420 2/3 shares of stock acquired, but as consideration for three additional agreements. These additional agreements were as follows:

> "In consideration of the purchase price paid him by second party, first party agrees that for a period of ten years from date hereof, said first party will not engage in Montana, Oregon, Idaho or Washington, either as owner, manager, employee or stockholder in a like or similar business to that now carried on by the E. H. Stanton Co., a corporation.
>
> "The first party guarantees the payment to second party of all accounts receivable of the E. H. Stanton Co. as they appeared on January, 1917, and those accrued, less the amount collected by second party on accounts which have been heretofore been charged off to profit and loss; that is to say, if the losses on the accounts receivable exceed the amounts collected or accounts which have been previously been charged off to profit and loss, first party will pay the difference to second party." (Trans. 38.)

In addition to the said two added agreements, it was orally agreed between Plaintiff in Error and Armour & Co. that for the said consideration so

paid of $576,400, Plaintiff in Error would for a period, not to exceed one year, render such assistance in the management of the business as Armour & Co. should require. (Trans. 79, 87, 105.)

The amounts of the accounts receivable of E. H. Stanton & Co. so guaranteed by Plaintiff in Error aggregated $350,000 (Trans. 79 and 107), and up to the time of the trial of the cases, Plaintiff in Error had been compelled to pay on account of this guarantee $22,534. (Trans. 94 and 107.)

It was testified by Plaintiff in Error, Mr. O'Hern, one of the representatives of Armour & Co., who closed the deal, and by Mr. Robbins, the other representative of Armour & Co., that the purchase price of all of this stock of Plaintiff in Error, Defendant in Error and said Hample was but $200 a share (Trans. 105, 106); that Armour & Co. was not willing to purchase the stock of E. H. Stanton & Co., unless it could obtain the agreement of Plaintiff in Error to retire from the meat packing business in the aforesaid states mentioned, and the Plaintiff in Error's guarantee the accounts receivable and his assistance in the business (Trans. 78, 85, 101, 106), that Plaintiff in Error, while willing to sell the stock of himself and family for $200 a share (Trans. 84, 106), demanded as consideration for his agreement to retire from the meat packing business, the guarantee of the book accounts and for the assistance which he should render in the business for a period not to exceed one year, $100,

000; that Armour & Co. was unwilling to pay this amount, but finally agreed that it would pay therefor an amount which would be the equivalent of $20 a share on the stock purchased from Plaintiff in Error, Defendant in Error and Hample (Trans. 93, 96, 106-107, 117); that the reason this method was adopted in making the figures was that when these representatives of Armour & Co. came to Spokane, the Company was advised that the stock could be purchased for $220 a share; that the representatives on the ground finally were willing to pay that price provided they could get with the stock, the agreement of Plaintiff in Error to withdraw from the meat packing business, guarantee of the accounts receivable and his agreement to assist in the business, but were unwilling to buy, unless it could get these additional agreements. (Trans. 79, 101.) That due to this situation, these representatives of Armour & Co. felt that it would be necessary for them to keep the entire amount paid for the stock, including these additional agreements on the part of Plaintiff in Error, within the figure of $220 a share (Trans. 86, 100); that when the representatives of Armour & Co. finally made the proposition to pay this amount of $92,266.67 in consideration of Plaintiff in Error retiring from the meat packing business, his guarantee of the accounts receivable and his agreement to assist in the business, Plaintiff in Error refused to accept the said proposition, but after some argument, the deal was

closed on that basis with the addition that Plaintiff in Error was given a certain automobile and Armour & Co. agreed to buy other stock which might be procured by Defendant in Error within a certain time (Trans. 107, 117).

Defendant in Error in his complaint in this case claims: (1) That Plaintiff in Error was acting as his agent and sold Defendant in Error's stock, as well as his own, at $220 a share; (2) that Plaintiff in Error misrepresented the amount for which the stock could be sold and induced Defendant in Error to act upon such misrepresentation to his damage in the sum of $20 a share (Trans. 2-6). In addition to the issues so presented by the complaints, the trial court submitted the case to the jury on the theory of liability for money had and received. Exception to the instructions given and refused were properly taken (Trans. 139).

SPECIFICATIONS OF ERRORS.

1. The District Court erred in instructing the jury as follows:

> "If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co. that the plaintiff had no information concerning the price which Armour & Co. was willing to pay, or the price which the defendant was to get for his stock except such as defendant gave him, that by reason of the misstatement or concealment of any material fact or facts by

defendant the plaintiff was induced to accept $200 a share for his stock, whereupon $20 on the number of shares owned by him was added to the price paid to the defendant for his stock without the plaintiff's knowledge or consent, and that this $20 a share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 a share, that I charge you that the amount of money thus received, to-wit, $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest thereon from the time of its receipt by the defendant at the rate of 5% per annum." (Trans. 131-132.)

2. The District Court erred in giving the jury the following instructions, and particularly that portion which, for convenience, we have italicized, to-wit:

"On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without advising or consulting with the defendant, and fixed upon his own selling price, there can be no recovery in this action, even though the defendant may have received a greater price for his own stock, *unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event the plaintiff is still entitled to the right to recover regardless of the question of agency.*" (Trans. 132.)

3. The District Court erred in giving the jury the following instructions, and especially that portion which, for convenience, we have italicized, to-wit:

> "The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized the defendant to sell his stock at the same price that defendant would sell his own stock and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell the stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the defendant and that the defendant received from Armour & Co., upon the sale of the plaintiff's stock the sum of $220 per share.
>
> In order for the plaintiff to recover on this theory he must therefore establish by a preponderance of the evidence the following propositions:
>
> 1. That the plaintiff authorized the defendant to sell his stock and the defendant agreed to sell the same at the same price as he received for his own.
>
> 2. That the defendant did in fact sell the plaintiff's stock or induce the plaintiff to sell the same.
>
> 3. That the price which Armour & Co. agreed to pay for the plaintiff's stock was $220 per share and not $200 per share.
>
> 4. That Armour & Co. have actually paid or agreed to pay for the plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant.
>
> If the plaintiff has failed to establish by the

preponderance of the evidence any of these propositions plaintiff cannot recover upon that theory. *If, however, you find from the preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant if still retained by him.*" (Trans. 132-133.)

4. The District Court erred in giving the jury the following instructions, and especially that portion which we have, for convenience, italicized, to-wit:

"If the jury find from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action and your verdict must be for the defendant, *unless, as already stated, you find from the preponderance of the testimony that a part of the consideration for the sale of the plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him.*" (Trans. 134.)

5. The District Court erred in giving the jury the following instruction, and especially that portion which we have, for convenience, italicized, to-wit:

"If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co. failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plain-

tiff withdrew his stock so deposited from the bank and notified Armour & Co. that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud, and thereafter the plaintiff entered into *a new and independent contract with Armour & Company for a new consideration* whereby he sold the stock in question, together with other stock in the same company, and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff.

"If, however, you find from the preponderance of the testimony that the stock was finally delivered to Armour & Co., pursuant to the contract made and entered into in the city of Spokane and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery." (Trans. 137-138.)

6. The District Court erred in entering judgment on the verdict in favor of Defendant in Error and against Plaintiff in Error. (Trans. 16.)

ARGUMENT.

I.

Specification of Error 1.

This instruction was erroneous for two reasons: (1) There was no evidence to support the same, and even if it should be held that the instruction correctly stated the law, the giving of such abstract instruction was misleading and confusing and inconsistent with other instructions to the prejudice of Plaintiff in Error; (2) If there was evidence sufficient to justify such an instruction, it was erroneous as fixing the amount of Defendant in Error's recovery at $20 a share.

1. The whole foundation for this instruction is the claim that the stock of Plaintiff in Error, and Defendant in Error, was purchased by Armour & Co. at $220 a share. In fact there is no foundation for, or theory of, recovery, unless the purchase price exceeded $200 a share. The alleged misrepresentation relate solely to this point as likewise does any claim of violation of agency. It cannot be questioned that Defendant in Error received but $200 a share and that he did not understand he was to receive more. There certainly is no direct evidence that any amount was paid for any of the stock of Plaintiff in Error, in excess of $200 a share, and if it can be said that there is anything in the record which would permit a jury to find that the purchase price was in excess of that amount, it must

be by way of justifiable inference. Keeping this thought in mind, we will consider the evidence in the case in detail.

The contracts made by Defendant in Error and Hample, signed by themselves, fixes the price of their stock at $200 a share. (Trans. 48, 58.) The written contract of Plaintiff in Error fixes no price for his stock, but does fix a lump sum of $576,400 which Armour & Co. were to pay for: (1) 2420 2/3 shares of stock; (2) Plaintiff in Error's agreement to withdraw from the packing business in the four states mentioned; (3) Plaintiff in Error's guarantee of the accounts receivable; (4) Plaintiff in Error's oral agreement to assist in the business for a period not to exceed one year. (Trans. 38, 89, 105, 116.) The contract, by its terms, does not attempt to segregate this consideration and apply the same to the different agreements passing from Plaintiff in Error to Armour & Co. It could be, with nearly as much reason, urged that the entire consideration was paid for the last three agreements, as that the said sum was only in consideration of the transfer of the stock. That the withdrawal of Plaintiff in Error from the packing business in the four states mentioned was a very valuable consideration, cannot be doubted; nor can it be doubted that the guarantee of the accounts receivable aggregating approximately $350,000 was a very valuable consideration. Not only was there a parting by Plaintiff in Error with very valuable considera-

tions, but these conditions were highly valuable to Armour & Co. The same is true, but to a lesser extent, with reference to the assistance to be rendered by Plaintiff in Error in the business for not to exceed one year. We will discuss these features more at length later, but suggest at this place that if the judgment of the lower court is sustained, it would be on the theory that Plaintiff in Error had given these valuable considerations, without return being made to him therefor, and Defendant in Error is to be made a beneficiary of these property rights. In other words, these added considerations passing from Plaintiff in Error to Armour & Co. have been used to swell the purchase price of the stock of Defendant in Error, a most unreasonable and unjust result.

The witness, O'Hern, with the witness, Robbins, were the representatives of Armour & Co. who had charge on behalf of that Company in making the contracts. The material portions of Mr. O'Hern's testimony bearing on this point is as follows:

> "Mr. Hample and Mr. Hamilton came to me one evening in the hotel and said they understood I was there to purchase the stock * * *. There seemed to be some feeling between them and Mr. Stanton * * *. They said they did not give anybody any authority to sell their stock, and if the stock was sold they were going to sell it themselves * * *. They started asking a price—I think, although I am not certain about it, somewhere around $250 a share, and I told them that we could not consider any-

thing like that, that I was told by Mr. Robbins he had an option on that stock to buy it at $220 a share and they said they had given no authority to anybody to sell that stock at $220 a share." (Trans. 76 and 77.)

"They came back a day or so before the deal was finally closed and said to me they were willing to sell their stock at $200 a share provided Stanton got no more for his stock than they got for theirs; and I advised them that there was some features in connection with this deal that I wanted cleared up. Mr. Robbins had indicated in a conversation that I had with him that he was not going to buy this stock without some guarantee that the book accounts—that was usual in buying stock—that those book accounts be guaranteed. There was book accounts amounting to over $350,000 there, that we wanted some guarantee on them and asked them if they were willing to guarantee it. They said no, absolutely they would not. I told them we also wanted that Mr. Stanton would not go into business in the immediate vicinity for a limited period of time, and if they would guarantee that he would not do it. They said they would have nothing to do with that; wouldn't do that. We told them we wanted Mr. Stanton's service for a period of three to six months, possibly constantly, and for at least a year in an advisory capacity, or subject to our call if we needed it. I asked them how they felt about that, and they said they would not assume any responsibility for that." (Trans. 78 and 79.)

"Mr. Stanton was holding off for what I thought was excessive prices for the features we were asking for, such as the guarantee of the book accounts and the other features. He finally agreed that in the event the deal was

made he would assume all responsibility for the book accounts. He would stay with us subject to call for a year and stay two or three months longer on the plant every day we desired." (Trans. 81.)

"The Witness: Yes. When that was concluded, I remember a remark that Mr. Stanton made. He said, "Now you fellows get out of here. I've got to make my deal."

Q. Mr. Kizer: That is, he said that to Hample and Hamilton?

A. To Mr. Hample and Hamilton. Everybody laughed and shook hands and they went out.

Q. Then did you make your deal with Mr. Stanton after they went out?

A. Yes, sir.

Q. At the time they went out, had there been a definite price agreed upon with Stanton for his stock and for the other considerations that he was giving?

A. There had been no definite price agreed upon. There was a trade being made upon it. We were apparently close together.

Q. At that time what was he hanging out for?

A. He was hanging out for a round sum. He had mentioned $100,000. He had mentioned some other consideration.

Q. The question I was asking, Mr. O'Hern, was he holding out for this $100,000 in addition to the set price for this stock?

A. At this time I can't say whether—, yes, in addition to stock, but I can't say at this time whether that was in addtiion to $200 or $220 a share for his stock. He knew what these other men were getting, and I had impressed

on him at that time, before he came into the conference, that there was no use agreeing to deal unless he could go within the figures that Mr. Robbins had mentioned to me, which was that he would not go beyond the option price—the aggregate option price for this stock.

Q. Then I take it that after Mr. Hample and Mr. Hamilton went out of the room you proceeded to dicker for his stock?

A. Yes, sir.

Q. Just detail the course of those negotiations.

A. Well, the same features incidental to a contract were then discussed in a preliminary way with Mr. Stanton, particularly with reference to his staying with us in business, staying with us or being subject to call for a certain period of time, and for the use of his services during that time. With reference to the book accounts, the guaranteeing of them, he made a little objection to that, but Mr. Robbins pointed out to him that we knew nothing about the customers or his trade at all, and that we would insist on that; that there was too much on the books there for the small concern it was to think of taking a business -over without knowing more about them, and they would not assume that responsibility. That was finally agreed upon. (Trans. 84 and 85.)

There was considerable trading, and they finally wound up and the figures agreed upon in there (indicating contract). (Trans. 86.)

A. $576,400. Mr. Stanton was asking for more, but Mr. Robbins said it would be ridiculous to consider, that it would put him in a very ridiculous position to go back home and tell those people that he paid a larger price than the option originally called for." (Trans. 86.)

Upon CROSS EXAMINATION, Mr. O'Hern testified as follows:

"We put in the additional agreement that we were to pay Mr. Stanton $220 for more stock if he could get it because Mr. Stanton was demanding more than we were willing to pay. I told Mr. Hample and Mr. Hamilton that Mr. Stanton wouldn't sell his stock without somebody taking care of his commission and asked them if they were going to and they said no, that they had nothing to do with that; that Mr. Stanton could not sell their stock; that if they traded they would trade direct and that Stanton had no right to give an option. * * *.

Q. No, I am asking about you, not about Mr. Robbins now.

A. All right; absolutely not. I had met them all a week ahead of that. (Trans. 87 and 88.)

Q. Now do you mean to tell us that you went on and closed up your contract with Hamilton and Hample without knowing whether you were going to be able to close with Stanton and what the terms with Stanton would be?

A. Yes and no. Mr. Stanton and myself had come to an understanding. We were not very far apart. Mr. Stanton's last word to me was 'You know what I want and I know what you are willing to give. Now we will be able to fix this up if these other fellows want to sell their stock.'

Q. At that time you knew you were willing to pay and were going to agree with Stanton to pay $220 a share for all stock that he could get hold of no matter what it cost him?

A. When and what time?

Q. At the time you told that to Hamilton and Hample.

A. I don't know that.

Q. What?

A. I don't know that. We told him that he —I am not certain whether that was agreed to before or after.

Q. How long after you signed your contract with them did you sign up with Stanton?

A. About two or three hours; the meeting was continuous. I think we went out to lunch in the interval, or something like that, while the attorneys were drawing up the papers. (Trans. 89 and 90.)

Mr. Robbins had told me on Saturday that under no consideration would he agree to buy these shares where in the aggregate they would amount to more than $220 a share, or the option, and for that reason he judged it was useless to figure with Stanton on any other trade.

Q. For above $220?

A. Yes.

Q. Well, but you did though—now why?

A. I don't quite see that we did.

Q. Well, you agreed to pay him $576,400 for 2420 2/3 shares; that is what your contract reads. I am talking of what your contract reads, which according to the figures you just made for me amounts to $238 and a fraction, and I expect that we took that 2/3 shares, which would amount to $239 and a fraction.

A. The exact result of the negotiations with him is not clear in my mind as to how that was arrived at.

Q. All you know is what the contract shows?

A. I know that Mr. Robbins had in his mind what I told you.

Q. Did you figure what his good will was

worth, his agreement not to enter into competition with you in the states mentioned in this contract?

A. You can not put figures on good will.

Q. I say did you?

A. We recognized it as an asset.

Q. Did you get any figure on the amount of it?

A. Oh, no. I don't think any two men can agree on what the value of good will is.

We did not put any figures on Stanton's services, although they had in mind what they would pay a manager; did not put any figures on the guarantee of the accounts, which amounted to about $350,000; that he had been informed at the office that Stanton had paid $5,000 in one item and $18,000 in another; and had taken over the accaunts.

He was to give all his time to Armour & Co. for three months and be subject to call six months or a year." (Trans. 93 and 94.)

MR. ROBBINS, the other representative of Armour & Co., testified as follows:

DIRECT EXAMINATION:

"After that contract was signed, Mr. Stanton said to them" (Hample and Hamilton) "in effect that if they would leave he would proceed to make his contract with us." (Trans. 100.)

Upon CROSS EXAMINATION he testified:

"My maximum of what I wanted to pay on this stock as a whole was $220 a share. While the option itself had elapsed in my opinion, I

knew the people at home had that figure fixed in their mind and I thought I would have to let the trade drop rather than have paid any more than that for the stock.

"I found that Mr. Stanton was not willing to take $220 for his stock. He had refused to do so in view of the guarantee and the limitations which we required to be a part of the trade. When I was told by Mr. O'Hern that Hample and Hamilton would probably take $200 for their stock, I could see a chance to trade, increasing the payments to be made to Mr. Stanton.

"When Mr. Hample and Mr. Hamilton came to my room that morning I said, 'I am informed by Mr. O'Hern that you are willing to take $200 for your stock.' One of them said 'Yes, sir.' I turned to the other gentleman and asked the same question. He said 'Yes, sir.' Well, I said, I guess there isn't any occasion to prolong this meeting. We will send for an attorney and let him draw up an agreement to that effect.

"Mr. Stanton wanted $100,000 more or less for the other things and I explained to him that I would not under any circumstances pay over the average of $220 for the stock. If Hamilton and Hample had demanded $220 for their stock from me, there would have been no trade. The thing would have ended there and there would have been no trade and we would have gone home. If I got the stock of these two men I could have gotten a control of the stock without Mr. Stanton." (Trans. 100 and 101.)

MR. KIZER, the attorney who drew the agreements of sale and who was present at the time of

the final negotiations for the stock of both Plaintiff in Error and Defendant in Error, testified:

"After talking a few minutes Mr. Stanton said, 'You fellows go on down stairs, I want to make my deal now.' They both laughed and prepared to leave and one of them said jokingly, 'Get as much money out of Armour as you can, he can afford it.'

"Mr. Robbins then told Mr. Stanton that he thought his price of $100,000 for staying out of business, guaranteeing the book accounts and assisting Armour & Co. in the management of the plant, was out of the question. That they had come west with an option to buy the stock at $220 a share and that if they paid Mr. Stanton this amount it would make the aggregate more than the amount of the option and that he didn't have the nerve to report back to the Chicago office after doing such a thing.

"Mr. Stanton said, 'You have offered me $200 for my stock and I will take $200 just as I agreed, but now you are speaking of something else and that is a horse of a different color. If you want it you will have to pay for it.' There was considerable argument and conversation. Mr. Stanton insisted that he would either sell his stock for $200 a share or he would sell for $200 and for $100,000 additional would stay out of business and guarantee these bills.

"Mr. Robbins suggested that they would rather risk buying the other outstanding stock and keeping Mr. Stanton with them than doing that because he was acquainted with the trade and they didn't care to have him for a competitor.

"Mr. Stanton finally suggested that if they calculated the difference between $200 and $220 per share upon all the stock it would amount to close to $100,000. We all figured up on that basis and it came to $92,266.66 and Mr. Robbins said, 'Mr. Stanton, that is just as high as we dare go.' But Mr. Stanton still said that wasn't enough. Then one of them, either Mr. Robbins or Mr. O'Hern, suggested that they would throw in the Packard car which had been talked about and Mr. Stanton said that would only make $94,000 or $95,000. There was a great deal of argument after that and trading back and forth and finally Mr. Robbins offered to agree to buy from Mr. Stanton all of the stock which he could pick up and pay him $220 per share for it, and Mr. Stanton finally consented to that. I then outlined to them a contract figured upon the basis of the stock at $200 a share and $92,000 odd dollars for these other things. Mr. Robbins said it would be best not to put it in that way; that Armour & Co. were always accused of being a trust and always trying to drive their competitors out of business and they didn't like to show any money consideration for that agreement and asked if it couldn't all be lumped in at that sum. (Trans. 116, 117 and 118.)

The above, we think, fairly shows the condition of the evidence in the case dealing with the question, except the testimony given by Plaintiff in Error. We have not quoted all of the testimony of O'Hern dealing with the question, but have quoted sufficient to show the nature of this evidence.

Plaintiff in Error testified that he was 59 years of age, had been in the meat packing business 35

to 40 years, that E. H. Stanton Co. was organized in 1904 for $150,000; that during the life of the corporation he was its sole manager, would go to the plant at 5 o'clock in the morning and leave at 6 or 7 o'clock in the evening, and would work part of the day on Sundays, and that he drew a salary of $300 a month. (Trans. 101-102.) That after the question of a deal with Armour & Co. was brought to his attention, he went to Butte, Montana, to interview Defendant in Error and Hample concerning the matter and while he was returning by train he received a telegram from Defendant in Error and Hample which read "Positively do not sell our stock. We will attend to that ourselves." And when he reached Spokane, he received another telegram from them saying "Positively do not sell our stock. Jim and I will leave for Spokane tonight." (Trans. 101 and 103.) On Sunday morning (the day before the sales were made) Plaintiff in Error had a further talk with O'Hern.

> 'I met him accordingly, and we talked the matter over quite fully. He said they had concluded to take our stock at $200 a share, but that they wanted me to agree to stay out of the meat packing business in this part of the country, and to guarantee the book accounts and also to remain and assist them at the plant for a time. That didn't sound very good to me, and finally he said they might consider giving me a small consideration for that, and I told him I would let them know the next morning.
>
> "Monday morning, Mr. O'Hern came out to

the plant between 7 and 8 o'clock and I told him I would do what they wanted for $100,000 in excess of what they wanted to pay for the stock. Mr. O'Hern said that he was sure that Mr. Robbins would not consider such a proposition for a minute, but that he would go back and see what he would say about it. He went back to town, and at about 11:30 that forenoon, called me over the phone and asked me to come down to the hotel at about 2 o'clock. Hamilton and Hample were out to the plant at that time, and I told them I thought Armour & Co. were figuring on closing up with us and that they wanted us to come in, and so we all went down and met Mr. O'Hern in the lobby. We went up to Mr. Robbins' room and Mr. Robbins said that O'Hern had told him that Mr. Hample and Mr. Hamilton had agreed to take $200 a share for their stock, and they said that they had, and he said he guessed that was all there was to it. We called up Mr. Kizer and he came over and got the terms of the contract and went back to his office and drew it up.

"After the contract was signed, I said, 'Now you fellows go on down town. I will try and make my deal.' And as they were going out they said jokingly, 'These folks have a lot of money, make as good a deal as you can.'

"After they had gone out Mr. Robbins told me that they could not consider paying me $100,000 in addition to paying for the stock, since that would run the purchase price considerably over the option which I had given them, and that Mr. Armour would think they were mighty poor traders.

"I told them that I was willing to live up to my agreement to sell my stock for $200 a share but he that they could not afford to buy my stock and then have me go into the

meat business again. Finally Mr. O'Hern suggested that we figure the price of the stock at $220 a share and upon counting it up that came to a little over $92,000 and I told them that was not enough, so they offered to throw in the little Packard automobile, which I figured made a total of about $95,000, and I stated to them that $100,000 was my price. Then one of them suggested that they would give me four or five months to pick up the balance of the stock and would pay me $220 a share for it. I concluded that was about as good as I could do and about all I could get so I accepted that. (Trans. 105, 106 and 107.)

"At the time of the trade the book accounts amounted to about $350,000 and up to date I have paid Armour & Company $22,534.00 on bad accounts and in addition defended a lawsuit upon one of them. I actually stayed out at the plant about two months and rendered services in an advisory capacity up to about a week or ten days ago." (Trans. 107.)

Defendant in Error offered no evidence whatsoever as to the price that was paid by Armour & Co. for the stock in question, except to introduce in evidence the written contracts made by Armour & Co. for the purchase of the stock to which we have above referred, and to introduce in evidence a portion of the cross examination of Plaintiff in Error given on the trial of another case where Plaintiff in Error was defending a lawsuit in which the agent, Fred B. Grinnell Co., was claiming an additional commission for making the sale, over that which was paid by Plaintiff in Error. Outside of introducing this cross examination in evi-

dence, there is no other evidence in the case except as Defendant in Error has attempted to weaken the effect of the testimony of these witnesses through cross examination. We have set out above so much of this cross examination as we think is necessary, and do not believe that the testimony of the witnesses has been shaken in the least. However, if it could be reasonably claimed that their evidence was shaken, it has not gone to the point where there is anything in the record to establish affirmatively the necessary element, to-wit: that the purchase price of the stock was $220 a share, and the burden of proving this was on Defendant in Error. The said cross examination of Plaintiff in Error given on the trial of the commission suit, to which we above referred, and which was introduced in evidence in this case, eliminating therefrom what we consider to be redundant to this case, is as follows:

> "MR. GRAVES: What do you mean by 92,000 odd? I want to get him somewhere where he will say. What were you to get over and above the $200 a share?
>
> A. I was to get twenty cents a share on all the stock that had been sold at that time.
>
> THE COURT: $20.00 you mean?
>
> A. Twenty dollars on all the stock that had been sold at that time, and it amounted to ninety-two thousand some odd dollars and that wasn't enough. Then I told them I would take the automobile in and even then it was not enough and then Mr. O'Hern made the proposition that he would give me $2.20 a share for

all the stock I would turn over to him in four months; and I closed the deal on those lines.

Q. You were to get $20 a share commission on all the stock which had been bought at that time?

A. Yes, sir.

Q. That included first Hample and Hamilton's stock?

A. Yes, sir.

Q. And second, it included yours and your family's stock?

A. It wasn't a commission.

Q. We won't call it anything. You were to get $20 a share on it?

A. That was the way we figured it.

Q. That meant now, reduced to figures, that you were to get $20 a share on Hample's stock, didn't it?

A. Not on Hample's stock, no, sir.

Q. Didn't include that?

A. No, sir, I had nothing to do with Hample's stock or Hamilton's.

Q. What stock had been sold at that time that you were to get $20 a share on?

A. On the stock that was sold—Mr. O'Hern —Mr. Robinson said it never would do to let that $100,000 or whatever it amounted to, get into Chicago that way. And that was the way he put it in. It was easier to let it go on the option that way.

Q. Let me see if I understand that. The only stock that he bought at that time was your stock and Hample's and Hamilton's, was it?

A. Yes, sir.

Q. Hample had 1096 and a fraction and Hamilton had 1096 and a fraction?

A. Yes, sir.

Q. And you had 2,420 and a fraction?

A. Yes, sir.

Q. That is all they bought at that time?

A. Yes, sir.

Q. Didn't you just say you were to get $20 a share on all the stock they bought at that time?

A. I explained that transaction to you right as we were in that Davenport Hotel, start to finish.

Q. To me?

A. Yes, right there.

Q. Well now, I am not asking you—I am a funny fellow about that, I like to get at it piecemeal. You were to get $20 a share on all stock that they had bought up to that time?

A. Yes, sir.

Q. Now they hadn't bought any stock up to that time, had they, except you three men's?

A. Yes, that is all.

Q. Now, were you to get $20 a share on these three lots?

A. It figured up that way.

Q. Never mind how it figured up, I asked you were you to get that?

A. Well, I was to get $20 a share on the stock that they had bought from Hample and Hamilton.

Q. And that $20 was in addition to the $200 on what they had bought from you, was it?

A. No, I don't think so.

Q. Well, then, you were not—either you

were or were not. I want to know which and I don't care a cent which it is.

A. Yes, it was on the stock that they had bought. It all figured up that much, yes.

Q. Then you were to get $20 a share on Hamilton's stock and Hample's stock, and Stanton's stock?

A. Yes, sir.

Q. In addition to the $200 on your stock?

A. Yes, sir.

Q. And that figured up to just $576,400?

A. Well, whatever it figures up.

Q. Well, it does figure up to that, don't you know it?

A. All right.

Q. Don't you know it—you know I figured it all up with O'Hern, took me about two hours but I finally got him to it—isn't that a fact, that is what it figures to?

A. The figures are right there.

Q. It figures up to the price stated in the contract, doesn't it? $576,400, doesn't it?

A. Something over $500,000.

Q. Doesn't it figure up to the price stated in this contract between Armours and you, $576,400?

A. Yes, sir, that is it.

Q. So then, instead of fixing a lesser sum of what you were to get for all of this good will, staying out of business, and guaranteeing accounts, and so on, instead of doing that you said, 'Now, you have got to give me $220 for my stock and then you have got to give me $20 a share on Hamilton's and Hample's stock?'

A. No, sir, nothing of that kind ever said.

Q. All right, we will pass that. 'And in

addition you have got to give me four months to speculate on the other fellows who haven't got in yet.'

A. That was their proposition and not mine.

Q. And you took it?

A. Yes, sir." (Trans. 34, 35, 36 and 37.)

From the evidence, to which reference is above made, we think, it appears conclusively not only that there is nothing in this case on which a court or jury could make a finding that in excess of $200 a share was paid by Armour & Co. for the stock, but that it affirmatively appears, without contradiction, that Armour & Co. did not pay in excess of $200 a share. There was no burden on Plaintiff in Error to prove anything with reference to the purchase price of the stock, but the burden was upon Defendant in Error to establish the pivotal fact alleged by him, namely, that Armour & Co. did pay $220 a share.

If it should be argued by the Defendant in Error that the jury had a right to find that Plaintiff in Error and his witnesses testified falsely, we submit that there is nothing in the testimony of any of these witnesses, which casts discredit upon their evidence, nor is there anything unreasonable in that testimony. But even if it could be said that the jury had a right to disregard the testimony of Plaintiff in Error and his witnesses, it would be unavailing to Defendant in Error. As suggested before, the burden of proof on this point was on

Defendant in Error, and, even if the jury was entitled to discredit such evidence, there would be left nothing on which the jury could make an affirmative finding that in excess of $200 a share was paid for the stock.

We apprehend that the real argument of Defendant in Error will be, that, this cross examination of Plaintiff in Error in the commission case, which evidence was introduced on the trial of this case, was sufficient to carry the case to the jury. If this should be the contention of the Defendant in Error, we respectfully submit that such a contention would be unsound. The witness in this cross examination was categorically answering questions propounded by counsel, who was seeking to frame his questions in such a way as to require answers on which a contention could be made, that the answers were inconsistent with Plaintiff in Error's theory. This opposing counsel reminded the witness that he was "a funny fellow" and that he liked "to get at it piecemeal." (Trans. 36.) In other words, counsel was desirous of splitting the answers up into many different parts, when it was necessary to give the whole transaction complete, and sought in this way if possible to create confusion. When this cross examination is read complete it is quite apparent that the witness on his direct examination had told his story in about the language as shown by his testimony in this case, and this cross examination was an effort to break down that story.

There is nothing, however, we submit, in this cross examination and the testimony of the Plaintiff in Error and his witnesses in this case, when properly analyzed, which supports the judgment. It first appears in this cross examination that Plaintiff in Error was being asked concerning this $92,266.67, since counsel was referring to "92,000 odd dollars." (Trans. 34.) That Plaintiff in Error was claiming on this examination that he, Hamilton and Hample had been paid but $200 a share for their stock, appears from the question of counsel where he says "* * * What were you to get over and above the $200 a share?" (Trans. 34.) That there was a controversy with Armour & Co. as to the amount that should be paid Plaintiff in Error for the agreements which were under discussion appears where the witness says "$20 on all the stock that had been sold at that time, and it amounted to 92,000 some odd dollars and that wasn't enough * * *." (Trans. 34.) That this extra payment had nothing to do with either Hamilton or Hample further appears as follows:

> "Q. That meant now, reducing to figures, that you were to get $20 a share on Hample's stock, didn't it?
>
> A. Not on Hample's stock. No, sir.
>
> Q. Didn't it include that?
>
> A. No, sir. I had nothing to do with Hample's stock or Hamilton's." (Trans. 35.)

That the controversy was over the demand of the Plaintiff in Error for $100,000, as testified to in

this case, appears when the witness says 'On the stock that was sold—Mr. O'Hern, Mr. Robbins said, I think 'It never would do to let that $100,000 or whatever it amounted to get into Chicago that way,' and that was the way he put it. It was easier to let it go on the option that way." (Trans. 35.) That counsel thoroughly understood Plaintiff in Error's contention appears:

> "Q. So then, instead of fixing the lesser sum of what you were to get for all of this good will, staying out of business, guaranteeing of the accounts and so on, instead of doing that you said 'Now you have got to give me $220 for my stock and then you have got to give me $20 a share on Hample's and Hamilton's stock.'
>
> A. No, sir. Nothing of that kind ever said." (Trans. 37.)

The last above question clearly shows that counsel understood the witness as intending to say that this sum of $92,266.67 was paid him for this "good will, staying out of business, and guaranteeing accounts, and so on." The witness had never said, nor is there a word in the testimony to the effect that either Plaintiff in Error, Defendant in Error or Hample were paid a penny in excess of $200 a share for their stock. There has never been any other contention, or claim, on the part of Plaintiff in Error than that this $92,266.67 was the consideration paid for staying out of business, guaranteeing accounts and for his agreement to assist in the business.

The sum total of the contention of Defendant in Error when analyzed is this: That Plaintiff in Error had voluntarily and gratuitously given to Armour & Co. three things of great value: (1) agreement to withdraw from the meat packing business, (2) guarantee of the book accounts, (3) agreement to assist in the business. That these three valuable agreements, which were personal to Plaintiff in Error, were given without consideration and for the purpose of swelling the value of the stock of Defendant in Error and Hample; that Plaintiff in Error was a tricky and unscrupulous person, and during the entire negotiation for the sale of this stock, had designs to overreach and defraud Defendant in Error and Hample and to rob them, and to profit where he was not entitled to profit. At the same time when it is claimed Plaintiff in Error was actuated by these base motives, he was without any occasion therefor, out of bigness of heart and pure generosity giving away without consideration his right to again enter the meat packing business, was guaranteeing accounts amounting to nearly four times what he claims was the purchase price of these additional agreements and promising to give his time in the business. Such a contention must on the mere face of the statement be branded as false.

That the agreement of Plaintiff in Error to retire from the meat packing business in the four states mentioned was a very valuable consideration, we think, cannot be questioned. It was the only

business in which Plaintiff in Error was qualified to engage and he was still in his prime. E. H. Stanton Co. was named after him, and since he had been practically in complete control of the corporation from its organization, it was, no doubt, largely known as his business. He knew the customers, he knew the trade and was in a position to have quickly built up a large and profitable competitive business. The corporation, through his management, had made great profits. Not only was Plaintiff in Error surrendering something of great value, but it was a consideration that was of tremendous value to Armour & Co. This court, we think, will take notice of the fact that it would have been nearly suicidal for Armour & Co. to have purchased this stock without such an agreement from Plaintiff in Error. The value of such an agreement, we have no doubt from the standpoint of Armour & Co. was greater than the entire consideration paid of $92,266.67. All the witnesses agree that Armour & Co. absolutely insisted upon this condition and would not have purchased without it. The consideration was entirely personal to Plaintiff in Error, and neither Defendant in Error, Hample nor any of the other stockholders of E. H. Stanton Co. had any right to participate in anything paid therefor. But, probably, Defendant in Error will argue that according to Mr. O'Hern's testimony (Trans. 81) it appears that Plaintiff in Error stated that he wanted to quit the meat pack-

ing business. If we shoud assume for the sake of the argument that this is true, it changes the result not a particle. It is one thing for a business man, such as Plaintiff in Error, to feel that he is ready to retire from business and another thing for him to bind himself to retire. Men very often change their minds on a question of this sort, and especially, such a man as Plaintiff in Error, who was then in the prime of life. But even if this were not true, the result still is the same. The value of the thing is determined not alone by the desirability of such thing from the vendor's point of view, but likewise from the vendee's point of view. Had not Plaintiff in Error made such an agreement, he might have started a competing business the next day. The same value was there to Armour & Co. in making sure that no such thing would occur. Any expressed intentions on the part of Plaintiff in Error to permanently retire from business was not the thing of value to Armour & Co., but it was an agreement which would absolutely prohibit such return and the value of the agreement to Armour & Co. was not reduced, even if Plaintiff in Error had expressed himself as being through with the packing business.

Likewise was the agreement of Plaintiff in Error to guarantee the outstanding accounts receivable, of very great value to Armour & Co., and was the creation of a heavy liability against Plaintiff in Error. Argument would seem to be unnecessary

to prove this assertion, but if a demonstration of this were necessary it is to be found in the uncontradicted evidence that Plaintiff in Error had been required to pay on account of this guarantee a total sum of $22,534. (Trans. 92, 105.) Many men would hesitate to guarantee these accounts, for less than the entire additional considerations paid Plaintiff in Error of $92,266.67. The court will take notice of the fact that with any business concern doing a credit business, there are many accounts that are uncollectable. The accounts receivable of E. H. Stanton Co. were very large when considered in the light of the business it was doing. (Trans. 114.) It is a well known fact that with any business concern doing a credit business, there is quite a percentage of accounts from time to time that must be charged off into profit and loss account. Plaintiff in Error was certain to be called upon to pay on account of his guarantee, and it was only a question of the amount.

While the agreement on the part of Plaintiff in Error to assist in the business is not of the same importance as his agreement to retire from business and the guaranteeing of the accounts, still this was a valuable consideration. The services of Plaintiff in Error were valuable and recognized by Armour & Co. as being valuable, and his services were in fact furnished.

In the light of all of this, if there was any

evidence whatsoever to sustain Defendant's contention that these additional agreements were a gift, that Plaintiff in Error was to receive nothing in return for them—and this must be Defendant in Error's contention—still we say it would be a most astounding situation. Let it be understood, however, that we most urgently insist that there is no evidence in this record that Plaintiff in Error, Defendant in Error or Hample were to, or did, receive a single penny for their stock in excess of $200 a share. Men and especially business men, ordinarily, act with some degree of reason. They do not convey property without some adequate return. They do not convey their individual property for the purpose of conferring the benefits thereof upon others. Men, who are covetous of their neighbor's property, who desire to defraud their fellowmen, do not in the same transaction give away their individual property voluntarily and without price and at the same time endeavor to, by misrepresentation and fraud, obtain a return of the value of such property by stealing from the other. Under any rule of reason the whole contention of Defendant in Error is branded as being unfounded and could not be accepted by any trier of facts, unless supported by overwhelming testimony and even then the mind would balk. However, if we are able to properly understand the record there is no evidence whatever to sustain such contention.

It follows from what we have said above if our position is sound that the record furnished no foundation for the giving of the instruction referred to in Specification of Error One (1), and, even if the instruction was correct as an abstract statement of law, prejudicial error was committed in giving such an instruction where there was no evidence to support the same.

> "*Abstract Instructions Generally.*—As the very purpose of instructions is to aid the jury in arriving at a proper verdict in the case, the jury should be informed in clear, plain and concise terms as to the law which is applicable to the particular case under consideration, and it is improper and erroneous for a court to give instructions to the jury which are not applicable to the case in any of its phases but which are mere abstract statements of the law. This rule holds good although the instructions contain correct statements in this respect, for the jury is not concerned with what the law may be generally, but only with that very small portion of it which must govern the particular matters under consideration. It is then the plain duty of a trial court to refrain from giving abstract instructions of its own motion, or at the request of either party. The principal and very forcible objection to abstract instructions, however correct in themselves, is that they are necessarily misleading, in that they tend to draw the minds of the jurors away from the real facts in the case to something which they assume to exist, but which cannot be found in the record." * * *.
>
> 14 *R. C. L.* 782.
>
> "*Applicability to Evidence.*—The scope of

an instruction in a particular case is to be determined, not alone by the pleadings therein, but also by the evidence in support of the issues between the parties, and, even though an issue is raised by the pleadings, it is not proper to give an instruction thereon although it may be abstractly correct, where there is no basis for it in the evidence. The principle upon which this rule is founded is that only such an instruction should be given as is based upon the legitimate evidence in the case. The fact that it may be correct as a general principle of law is not material, for it is the duty of the court to confine itself to a statement of such principles of law as are applicable to the evidence received in support of the contentions of the parties, and thus to aid the jury in arriving at a correct determination of the issues involved. If an instruction is not thus based on the evidence it is erroneous in that it introduces before the jury facts not presented thereby, and is well calculated to mislead and induce them to suppose that such a state of facts in the opinion of the court was possible under the evidence. * * *. But while it is error to give a charge not applicable to the case as made by the evidence, it is harmful error only when the complaining party may probably have been prejudiced by the instruction. The courts, however, ordinarily regard the giving of an instruction having no basis or foundation in the evidence in the case in which it is given as prejudicial, unless it is clearly apparent that the jury could not have been misled by it."

†4 *R. C. L.* 786, and cases cited.

The instruction so far as it related to the stock having been sold for $220 a share while it was within the issues as made by the complaint, yet it

was not within the case as made by the evidence, and as a result the giving of such instruction was prejudicial. The quotations above from Ruling Case Law are abundantly supported by the adjudicated cases, a very few of which are the following:

The case of *Goodman v. Simonds,* 61 U. S. 343 (15 L. Ed. 934), was brought by the holder of a bill of exchange against the acceptor, the defense being that the bill was accepted and delivered to the original holder without consideration and for special purposes. The trial court charged the jury that if the original holder had no interest in the bill, or its proceeds, nor authority to use it for his own benefit, and the plaintiff knew or should have known such fact, their verdict should be for the defendant. At page 939 of the Law Edition it is said:

> "There is, however, some reason to doubt whether the evidence at the trial furnished any proper basis for the application of the instruction in this case, even supposing the principle announced to be correct as an abstract proposition; and this gives rise to a preliminary question, which will be first considered, whether the instruction ought not to be regarded as objectionable on that account. When a prayer for instruction is presented to the court, and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule, if it is given under such circumstances, it will be error in the court, for the reason that its tendency may be and often is to mislead the jury, by withdrawing their attention from the legitimate points of

> inquiry involved in the issue. All that was shown at the trial, in addition to the description of the bill, was the refusal of the plaintiff to discount it when it was offered for that purpose, his possession and control of it shortly after, as a pledge for temporary loans, and the subsequent transfer of the bill to him as collateral security at the settlement, together with the circumstances of that transaction, and what appeared in the letter of T. S. Goodman & Co., transmitting the bill to St. Louis for sale. Other circumstances are adverted to in the printed argument for the defendant; but as they do not appear to be sustained by the evidence in the case, they are omitted. Nothing transpired when the bill was offered for discount, more than what occurs on similar occasions in the daily transactions among business men. It was offered and declined, and that was the whole transaction, so far as it was disclosed in the evidence. No reasons were assigned by the plaintiff for declining and none were asked for by the holder, who offered the bill."

In *Blackburn v. Crawford's Lessee,* 70 U. S. 175 (18 L. Ed. 186), the question was whether a marriage had been solemnized. The evidence tended to show that if there had been a solemnization of marriage it was at a certain time and place. The trial court submitted the case to the jury in a manner which permitted them to find that a marriage was solemnized at any time. The court at page 194 of the Law Edition says:

> "The three instructions given by the court *sua sponte* were characterized by a common error. They submitted to the jury, as a ques-

> tion to be considered, whether there was not a marriage at a different time and place, and contracted in a different manner from that alleged by the putative wife, Elizabeth Taylor. Her testimony was clear and positive. It was wholly inconsistent with such a proposition. If there were none as alleged by her, clearly there was none at any time. This was the hinge upon which turned the controversy. All the testimony clustered about and related to that inquiry. The jury should have been so instructed, and their deliberations confined accordingly. Lord Hale says, they should be told 'where the main question or the knot of the business lies.' Hale's Hist. Com. Law, 256. The further inquiry did not arise in the case. What was said could hardly fail to mislead and confuse. It permitted them to substitute conjecture for deduction, and opened a field beyond the sphere of the case, where the means of error were abundant."

The case of *Buyken v. Lewis Construction Company,* 51 Wash. 627 (99 Pac. 1007), was in trespass to recover damage for sluicing down and removing earth from a certain lot in Seattle. The defendant admitted the committing of the acts and justified by claiming that such acts were done persuant to a contract with plaintiff. The jury was instructed as follows:

> "If you find from the evidence that there was no such contract as alleged by the defendant in its affirmative defense, which is exhibit No. 2 in the case, but do find from the evidence that the acts performed by the defendant upon the said premises of the plaintiffs were performed with the knowledge and consent of the

> plaintiffs, then I instruct you that the plaintiffs cannot recover for such acts even though in your opinion the plaintiffs have been damaged thereby, unless you find from the evidence that defendant negligently or carelessly performed the acts and by reason of such negligence and careless performance the plaintiffs had been damaged."

The opinion was written by Chief Justice Rudkin, who said:

> "The latter part of this instruction is clearly without the issues presented by the pleadings. The action was prosecuted by the respondents solely on the theory that the acts complained of were committed without their knowledge or consent and against their will, and all their testimony was directed toward establishing the allegations of the complaint and proving the amount of the resultant damages. The testimony on the part of the appellant, on the other hand, was in support of its affirmative defense, and in reduction of the claim for damages. The question of negligence in the prosecution of the work was not an issue in the case under the pleadings, nor was it made an issue at any stage of the trial. There was no claim that any particular act committed by the appellant was negligently or carelessly committed, nor was there any attempt to segregate damages resulting from negligence from damages resulting from other and independent causes. The instruction was therefore erroneous, and calls for a reversal of the judgment unless we are able to say that the error was not prejudicial, and this we cannot do. There was a direct conflict in the testimony, and the right of recovery was questionable at least. The jury may have found that the acts committed by the

appellant were so committed with the knowledge and consent of the respondents, but that damages resulted from the performance of the work in a manner the jury deemed negligent. Under such circumstances, it is incumbent on this court to order a new trial. *Bernhard v. Reeves,* 6 Wash. 424, 33 Pac. 873; *Comegys v. American Lumber Co.,* 8 Wash. 661, 36 Pac. 1087; *Kirby v. Rainier-Grand Hotel Co.,* 28 Wash. 705, 69 Pac. 378."

In *Central Georgia v. Cornwell,* 76 S. E. (Ga.) 387, the court used the following language at page 389:

"The general rule is that instructions given to the jury must be based upon evidence; and it is error for the court to give instructions to the jury that are not warranted by the evidence. 'A charge is objetcionable which states general principles correctly, but which are nevertheless not applicable to the facts as proven. The instructions should always be given in reference to the evidence in the particular case.' *Gorman v. Campbell,* 14 Ga. 137. In delivering the opinion in the case just cited, Judge Lumpkin said (page 142): 'Nothing is more dangerous than to lay down general propositions which, instead of aiding, scarcely ever fail to mislead juries. Courts should apply the principles of law to the facts in evidence in each particular case, stating those facts hypothetically.' A charge may be abstractly correct; but, unless it is authorized by the evidence in the case it is nevertheless erroneous. *Butt v. Maddox,* 7 Ga. 495 (3); *Towns v. Kellett,* 11 Ga. 286 (2), 293. This court has held to the above stated effect in numerous cases. See 7 *Michie's Dig.,* Ga. R. 570, 571."

See also:

Boston & M. R. Co. v. McDuffey, 79 Fed. 934 (942);
Mohrenstcher v. Westervelt, 87 Fed. 157 (163).

If the instruction was within the issues, still Defendant in Error was not entitled to recover from Plaintiff in Error $20 a share on the amount of his stock sold with interest. Certainly this could not be true. If Defendant in Error's contention should be sustained, the entire amount which Plaintiff in Error profited by the transaction was $20 a share, less the agent's commission of two per cent on $220, or such profit would be but $15.60. If it were true that this stock was sold for $220 a share, then Plaintiff in Error was receiving net but $15.60 a share, or if receiving $20 a share, such sum was charged with the payment of its part of the commission. The very foundation of this action is the option given by Plaintiff in Error to Fred B. Grinnell Co. for Armour & Co. on May 8, 1917, the terms of which option were $220 a share for the stock, the agents to receive two per cent commission. In paragraph 5 of the complaint it is alleged:

> "That during the month of May, 1917, without the knowledge or consent of this plaintiff, the defendant contracted to sell his, the defendant's stock and all the plaintiff's stock to Armour & Co., a corporation, and that the price stipulated in said contract of sale for said stock was two hundred twenty dollars ($220) per share. That after the making of

> said contract between defendant and said Armour & Co. defendant represented to plaintiff that he had an opportunity to sell plaintiff's stock and his, the defendant's stock, to Armour & Co., but falsely and fraudulently represented to plaintiff that the price defendant was to receive therefor was Two Hundred dollars ($200) per share. That defendant contracted to sell to said Armour & Co., 5084 1/3 shares of the capital stock of said E. H. Stanton Co. to Armour & Co., at said time, at said price of Two Hundred Twenty Dollars ($220) per share, and that said amount or number of shares included plaintiff's said stock." (Trans. 4.)

On the trial of the case, Defendant in Error pursued the same course and for the purpose of attempting to show that Plaintiff in Error sold the stock of Defendant in Error for $220 a share, introduced in evidence the said option so given to Fred B. Grinnell. (Trans. 40-1.) The situation, therefore, is that Plaintiff in Error is seeking to recover alleged rights based on the said option agreement of May 8, 1917, and by the instruction of the court, he has escaped the burden of that agreement. In other words, Defendant in Error has been awarded a judgment for $440 more than under any theory he could claim. The District Court's instruction gave the jury no alternative but to return a verdict in favor of Defendant in Error for $20 a share, if the verdict was returned in his favor in any sum.

But probably, Defendant in Error will say that there is testimony to the effect that Plaintiff in

Error said that he would look after the commission in consideration of the satisfaction of the $25,000 note. (Trans. 50, 54.) While there is some evidence bearing upon this question, yet there is evidence contradicting such claim. (Trans. 107.) Therefore, the District Court should have submitted such conflict of evidence to the jury for decision, and if the jury found that there was no such agreement that Plaintiff in Error would take care of the commission, that then Defendant in Error's recovery should be reduced to the extent of the commission. The jury, however, was given no such privilege, but the instruction was absolute, requiring a verdict of $20 in any amount.

We have said above that there was a conflict of evidence as to whether Plaintiff in Error in consideration of the release of the $25,000 note was to pay any commission due Fred B. Grinnell & Co. However, this conflict in evidence was not of such a nature as to warrant a verdict being returned against Plaintiff in Error in excess of $15.60 a share. Even according to the testimony of Defendant in Error and his witness, this agreement on the part of Plaintiff in Error was contingent upon Defendant in Error's selling his stock for $200 a share. It had nothing to do with Plaintiff in Error paying a commission on Defendant in Error's stock in the event Defendant in Error was paid $220 a share and, therefore, no occasion exists in this case, if it should be held that Defendant in

Error is entitled to recover, that Plaintiff in Error should be required to pay the commission for the sale of this stock.

Not only was the instruction erroneous in that it eliminated from the consideration of the jury the commission which should be deducted from $220 a share, but it was likewise erroneous in that the jury was not permitted to make any allowances for the additional consideration individually contributed by Plaintiff in Error in order to obtain the price of $220 a share, if the stock was sold for that price. As shown above, Plaintiff in Error individually contributed his contract to retire from the meat packing business, guarantee of the book accounts on which he has already paid $22,534, and his agreement to give a portion of his time in the business. The instruction in the latter part deals "with equity and good conscience," which words we assume the District Court used because this is an element in action for money had and received. As we will later show, the court submitted this case on the theory of money had and received, and certainly if 'equity and good conscience" has anything to do with this case, the least that can be said is that the jury had a right to consider the fact that Plaintiff in Error had individually contributed these additional considerations for which a suitable allowance should be made in the verdict.

If this Court should hold that the instruction in question was within the evidence, and not objec-

tionable in form, yet for another reason the instruction should not have been given. We will later show, that notwithstanding the issues in this case as made by the complaint, was on the theory that Defendant in Error was entitled to recover by reason of violation by Plaintiff in Error of his duties as agent, and also by reason of misrepresentation, yet the District Court submitted the case to the jury also on the theory of a recovery for money had and received. It is the universal holding, we believe, of the courts, that a party cannot for the same wrong claim both in tort and assumpsit; that a claim in assumpsit is a waiver of any claim in tort, since the two actions are diametrically different, and the measure of recovery is governed by different rules.

> "An action for money had and received is an equitable action governed by equitable principles, and in it plaintiff waives all torts, trespasses and damages. * * *."
>
> 27 *Cyc.* 849.

> "The person entitled to waive a tort and sue in assumpsit, is the person who has been legally injured by the tort. * * * An election between inconsistent rights and remedies cannot be reconsidered even where injury has been by the choice, or would result from setting it aside. Hence, an election to waive a tort and to sue in *assumpsit* takes effect on the commencement of the action, whether it precedes the judgment or not; and an amendment of the declaration against the objection of defendant, changing the nature of the action from *assump-*

sit to an action on the case for deceit is unauthorized. The judgment rendered in the case will be a bar to any other form of action between the same parties for the same cause, for it is clear that a single cause of action cannot be split into two causes of action. * * *."

2 *R. C. L.* 760.

See also:

2 *R. C. L.* 753.

The measure of recovery is different where the action proceeds in tort from the measure of damages in *assumpsit*.

"Where an election has been made to sue in assumpsit rather than in tort, the basis of the action is the benefit which the wrong-doer has received rather than damages for the tort. * * * Where *assumpsit* is brought under the money counts, the recovery will be confined to the sum actually received by the defendant for the property."

2 *R. C. L.* 761.

II.

Specification of Errors 2, 3 *and* 4.

The three instructions given by the District Court to which these specifications refer, each contain practically the same objectionable language, such language, quoting from the first mentioned instruction, being as follows:

"Unless you find from the preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plain-

> tiff was actually paid to and received by defendant, and was still retained by him. In the latter event the plaintiff is still entitled to the right to recover regardless of the question of agency."

We submit that these instructions were erroneous and require the reversal of the judgment of the lower court for the following reasons:

(1) The instructions were not within the issues as made by the complaint, or the evidence; the instructions, if within the issues, or the evidence, did not correctly state the law as applied to any evidence appearing in the record, if it should be held there was any evidence that the stock was sold for a price in excess of $200 a share. If the instructions were intended to refer to a state of facts not within the evidence, they were purely abstract instructions, and could not fail to mislead the jury to Plaintiff's in Error's prejudice.

(2) The theory of recovery, as here authorized, was not consistent with the theory of the complaint and the instruction discussed under Point I above, and the case could not be submitted on both theories.

(3) If these instructions were given on the theory that the action was for money had and received, the law was not correctly stated in that the "equity and good conscience" claims of Plaintiff in Error and Defendant in Error were not incorporated in the instructions.

(4) It was prejudicial error to emphasize this instruction by repetitions, leaving the jurors to infer that the District Court considered this feature of particular importance.

1. That the criticised portion of these instructions was not within the issues as made by the complaint, was clearly recognized by the District Court (Specification of Error 3). We further submit there was no such issue raised by the evidence. The record fails to disclose that Defendant in Error was attempting to make such issue, and necessarily Plaintiff in Error was required to have the case go to the jury on an issue foreign to anything raised by the pleadings, and without opportunity to meet the same. After the evidence had been introduced, and the arguments made, for the first time this issue was presented through the instructions of the court. With the character of the evidence which was introduced, it was scarcely less than a peremptory direction that the jury should find for Defendant in Error. This objectionable portion was a part of instructions in which the court had previously stated, that if Plaintiff in Error was not the agent of Defendant in Error, and did not sell his stock, and did not make any misrepresentations, then Defendant in Error could not recover. Immediately following this language was the objectionable portion above quoted. This must have carried the impression to the jury that, if Plaintiff in Error had profited as a result of

the sale of the stock of Hamilton and Hample, then he was liable. Manifestly, Plaintiff in Error would not be liable on these conditions; he had a perfect right, if he desired, to make an agreement with Armour & Co., that it pay him a commission on any purchases of stock, or an agreement that in the event it purchased any stock for less than $220 a share, it would pay him the difference, so long as Plaintiff in Error owed no duty to Defendant in Error, and made no misrepresentations inducing him to sell. If there is any evidence in the record of any nature or kind justifying such instructions as these, or if any inference can be drawn from the record justifying such instructions, the most that could be claimed would be that the jury was warranted in finding that Plaintiff in Error had an understanding with Armour & Co. that he was to be paid a commission, or that he was to be given the difference between the purchase price and $220 a share. There is no law which prohibited Plaintiff in Error from having such agreement, nor which would render him liable. When we consider that the District Court not only gave this instruction once, but three times, there can be no uncertainty as to the impression that was created on the mind of the jurors. The criticised portion of the instructions was given, conceding that Plaintiff in Error owed no contract duty to Defendant in Error, had violated no agency, had not sold Defendant in Error's stock, and had made no misrepresentations Given these conditions, which were the basis of the

instructions, there existed no legal or moral objection to Plaintiff in Error dealing with Armour & Co. as he saw fit.

We submit, however, as has already been discussed under Point I, above, that there was no evidence of any nature or kind to go to the jury on the question of Plaintiff in Error having received any part of the consideration from the sale of the stock of Hamilton and Hample. We have quoted at considerable length above from the evidence in the case bearing on this question, and respectfully ask the court in connection with these Specifications of Error to again consider such evidence. We think that an examination of this evidence can lead to but one conclusion, and that no inference contrary thereto can be drawn, which is this: Armour & Co., finally, was willing to purchase a majority, or all, of the stock of E. H. Stanton Company, the agreement of Plaintiff in Error to withdraw from the packing business in the four states mentioned in the contract, the guarantee by Plaintiff in Error of the accounts receivable, and the agreement of Plaintiff in Error to assist in the business, and was willing to pay a lump sum for all of these considerations, which would aggregate an amount produced by multiplying the number of shares acquired by $220. There is no evidence or inference from the evidence which will produce any different result. The stock was owned by different individuals, including Plaintiff in Error, Defendant in Error,

Hample, and others. The right of Plaintiff in Error to do business, the guarantee of all of the accounts, and the agreement to assist in the business were purely personal to Plaintiff in Error. Neither Hamilton, Hample, or any other stockholders of the E. H. Stanton Company, had any right to receive any benefit that flowed from the purchase of these added conditions and agreements. They were valuable considerations, and the purchase price thereof belonged to Plaintiff in Error. All the evidence shown by the record squarely contradicts the claim that Plaintiff in Error received anything on account of Hamilton and Hample's stock, and there is no inference that can be justly drawn from the record that he did receive any part of such purchase price. To even speculate, or guess, that he received any part of such purchase price is to say that he voluntarily, and without consideration, made a gift of these three agreements, which necessarily went to swell the purchase price of the stock of Hamilton and Hample.

When we consider that it must be the contention that Plaintiff in Error made such gift at that time, and at the same time had formed a secret plan to misrepresent the facts to Hamilton and Hample, and rob them, the utter unreasonableness of the contention is at once apparent. Such a contention violate every principle of reason, and the mind cannot accept such claim. To say in one breath that Plaintiff in Error was scheming to cheat and

defraud, and in perpetrating such fraud voluntarily made this gift, is to appeal to the wildest fancy. The natural query is, Why was it necessary to perpetrate a fraud, or to steal, when the stake involved could be legitimately and properly acquired? The evidence is conclusive, and there is no contradiction that Armour & Co. would not purchase the stock without acquiring these additional agreements, which belonged solely to Plaintiff in Error, and which he alone could sell. (Trans. 80, 100-101, 105.)

We can conceive of but two possible constructions of these criticised instructions: (1) Even though Plaintiff in Error was not an agent, and made no misrepresentations, yet that he is liable if by any arrangement he made a profit through Armour & Co. purchasing Defendant in Error's stock; (2) That he was liable if any of the purchase price of Defendant in Error's stock was paid to him by Armour & Co. for the use and benefit of Defendant in Error.

That Plaintiff in Error would not be liable in the absence of breach of agency, or fraud and misrepresentation, if he made a profit either by way of commission, or otherwise, out of this purchase by Armour & Co., it seems to us, is at once manifest. As has been suggested before, he had a legal and moral right, if he so desired, to act as agent for Armour & Co., or to have any other agreement which he might be able to obtain from Armour &

Co., whereby he was to receive a consideration on the purchase of the stock. To hold otherwise would be to say that an ordinary broker is liable by reason of having received a commission, or that the ordinary broker is liable to the etxent of any compensation which he has received. We do not wish it to be understood that we concede that Plaintiff in Error had any such agreement with Armour & Co., since under the evidence, as we understand it, it conclusively appears that the only money received by Plaintiff in Error was as consideration for his own stock at the price of $200 a share, and the remainder in consideration of his three additional agreements.

If it should be argued by Defendant in Error that this was an action for money had and received, and that there is any rule in such an action which would authorize such instructions, such contention would be wholly without foundation. The action for money had and received proceeds on the primary principles that the defendant has something which does not belong to him, and which does belong to the plaintiff.

If it should be calimed that this instruction had to do with a state of facts, where money was paid to Plaintiff in Error for the use and benefit of Defendant in Error, it is sufficient to say that there was no such claim made, and such claim would be not only against the positive evidence to the contrary, but likewise against any inference that could

be drawn from the testimony. Such a basis in the evidence, however, is the only one that could exist which would make the instruction as given abstractly correct. The contract with Defendant in Error clearly shows that it was not intended that he was to receive more than $200 a share; there is nothing in the testimony indicating, either inferentially, or otherwise, that there was an additional amount paid, or to be paid, for his benefit. The money paid Plaintiff in Error was the amount only that his contract required should be paid for his own stock and the three additional agreements to be performed by him. If it could be argued that anything was paid Plaintiff in Error in excess of what he was entitled to receive, the argument would necessarily have to proceed on the assumption that he had violated some agency agreement, or had committed a fraud, which elements the court excluded from these instructions. It follows, therefore, we think conclusively on this theory of the purpose of the District Court, the instructions were purely abstract and misleading to the prejudice of Plaintiff in Error.

14 *R. C. L.* 782, and cases cited.
14 *R. C. L.* 786, and cases cited.

Goodman v. Simonds, 61 U. S. 343 (15 L. Ed. 934, 939).

Blackburn v. Crawford, Lessees, 70 U. S. 175 (18 L. Ed. 186, 194).

Buyken v. Lewis Construction Co., 51 Wash. 627 (99 Pac. 1007).

Central Georgia Power Co. v. Cornwell, 76 S. E. (Ga.) 387, 389.

2. As we have already shown, this case was submitted to the jury on the dual theories: (1) Tort; (2) Money had and received. These theories were inconsistent, and it was error to send the case to the jury on both theories.

The vice of the instructions in this respect is that, in the first portion of the instruction embodied in Specification of Error 3, the jury is told that the theory of complaint is that Plaintiff in Error had practiced fraud and deceit upon Defendant in Error, and had violated his duties as agent to Defendant in Error's damage, and that if the jury found this to be true Defendant in Error might recover damage, to-wit: $20 a share; but that if he failed to establish these necessary facts, he might still recover, if Plaintiff in Error had received any part of the consideration for the sale of Defendant in Error's stock, such sum as had been paid to Plaintiff in Error and was still retained by him. This was clearly a submission to the jury of two distinct and inconsistent theories, with permission, if they found Defendant in Error had proven his case on either theory, to return a verdict in his favor.

Defendant in Error acquiesced in the court's statement as to the theory of the complaint. In fact it can not be doubted that the theory of the

complaint is correctly outlined by he court. The qualification to this instruction, however, submits the case to the jury on the theory of money had and received, the co-relative of tort, and it becomes necessary to determine the distinction between these theories in order to ascertain whether or not Plaintiff in Error was prejudiced by this submission.

The very theory of the action of money had and received is that the defendant has committed a tort to the damage of the plaintiff and to the profit of himself; that the plaintiff waives the damage to himself and, ratifying the contract by which the defendant has profited sues to recover the amount by which the defendant has unjustly enriched himself. The elements of this sort of action are, that the defendant has committed a wrong (a tort) against the plaintiff, that this wrong has resulted in an enrichment of the defendant, that the plaintiff waives the damages for the wrong and sues for the amount by which the defendant has been enriched as for money had and received to the use of the plaintiff.

In discussing this form of action a well known author says:

> "We now proceed to consider a limitation to which the action of *indebitatus assumpsit* is subject where the plaintiff waives the tort and sues on the contract. In the leading case of *Lamine v. Dorrell* the conversion was accomplished by selling, and the action was brought to recover the proceeds. In theory such act-

ual conversion into money or its value is always necessary.

"There are two reasons for this. The count for money or goods had and received is founded on equitable theory, and it is necessary that there should be a property right on which liability can be predicated. The converter is held liable in respect to the proceeds acquired by him in exchange for the property, as a sort of trustee *ex maleficio*. Again, being *in consimili casu* with debt, this count has inherited from that action the limitation that it can be maintained only where there is a duty to turn over money or goods ascertained in amount or capable of being reduced to certainty. This requirement is fully met in situations where there has been a sale or exchange of the converted goods, but it is not met in the absence of actual sale or exchange.

"It will thus be perceived that the duty upon which the implied contract is here predicated is a duty to disgorge the proceeds of an unlawful acquisition, and not upon the mere general duty to compensate for injury done. From this it follows that in actions of this kind the plaintiff can recover of the defendant only so much as he has actually received for the goods irrespective of their actual value.

"On general principle the rule is that wherever one person commits a wrong or tort against the property of another, with the result of benefiting his own estate, the law will, at the election of the party injured, impose a contractual duty on the wrongdoer to pay the party injured the full value of the property appropriated; and this duty may be enforced by the action of *indebitatus* in some of its forms.

"The proposition just stated indicates the point beyond which the fiction of contract cannot be indulged. No form of *indebitatus* will lie to recover damages for a merely destructive trespass. It is essential that there should be an unjust enrichment of the estate of the tort feasor. This limitation will be found to be inherited from the action of debt. To create a common-law debt, the *quid pro quo* must accrue as a benefit to the debtor, and at the same time it must move from the creditor. So here the loss of the plaintiff must be the gain of the defendant. It is not sufficient that the plaintiff suffers a detriment. The legal duty to make reparation for damage does not by implication raise a promise to pay such damage.

"The distinction now being considered has not, as might be imagined, lost its importance with the abolition of forms of action, for it is implicated with the question whether the right of action survives after the death of a party; and apart from statute the survival of rights of action is unaffected by the abolition of forms."

Foundations of Legal Liability (Street), Vol. III, 196-197, 199-200.

Keener in his work on quasi-contracts says:

"If any one in the commission of a tort enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in *assumpsit* to recover the value of that which has been tortiously taken or used. The remedies in tort and *assumpsit* not being concurrent, a plaintiff is compelled to elect which remedy he will

pursue; and if he elect to sue in *assumpsit,* he is said to waive the tort. The doctrine of waiver of tort is simply a question of the election of remedies. Said Allen, J., in *Cooper v. Cooper,* 147 Mass. 370:

"'The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy; and in that sense may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty of pay damages for a tort does not imply a promise to pay them upon which *assumpsit* can be maintained.'

"With equal propriety, therefore, when an election is made to sue in tort, one could say that the quasi-contractual obligation is waived. It is usual, however, to speak of waiver of tort only for the reason that the remedy in tort is the older. The tort is, however, waived only in the sense that a party having a right to sue in tort or *assumpsit* will not, after he has elected to sue in *assumpsit,* be allowed to sue in tort. By such an election that which was before the election tortious does not cease to be so. *In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is able to recover.* There being no contract between the parties, *unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him.* Had not this almost self-evident proposition been lost sight of, because of the fiction of a promise involved in the action of *indebitatus assumpsit* when brought to enforce a right of action not resting on contract, much of the confusion in, and conflict of, decisions now existing would have

been avoided. The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension, in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right.

"Assuming a defendant to be a tort feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort."

The Law of Quasi-Contracts (Keener), 159-160.

See also:

27 *Cyc.* 849.
2 *R. C. L.* 753, 760 and 761.

As we suggested before, it is not the fact of damage which determines the recovery in the action of money had and received, but it is the enrichment of the defendant by the tortious taking, the tort being a necessary incident in the proof.

"An action lies against one into whose hands money actually belonging to the plaintiff can be traced as well as where he received the money in the first instance. But the recovery must be limited to cases where money is received for plaintiff by someone standing in a fiduciary capacity to plaintiff * * *."

27 *Cyc.* 869.

"One who has been induced by the fraudulent representations of another to enter into a contract may affirm it and maintain *assumpsit* for a breach, or he may disaffirm it and maintain tort; but if he disaffirms and brings a tort action he can not afterwards turn it into an action of *assumpsit* and recover as for an implied promise. As a general rule, the tort may be proved and recovery had in an action of *assumpsit* in all cases where one has been fraudulently induced to part with his money or personal property other than money * * *."

2 *R. C. L.* 759.

"The full determination of all these questions does not appear to be necessary to the proper disposition of this motion. The patented inventions were property of the orator. When the Windsor Manufacturing Company sold machines embodying these inventions to the defendants for use it invaded the orator's rights and converted the orator's property to its own use. These acts were tortious and an action would lie for these wrongs. As that company received money for the orator's property, the orator could waive the tort and sue in *assumpsit* for the money, or, what is the same in effect, proceed for an account of the money received. In an action or proceeding for the money the measure of damages would be the amount of money received, not the amount of damage done, and all right of recovery beyond that would be waived. This is the effect of waiving the tort. The recovery of satisfaction in either form would pass the right to that for which satisfaction was had, and there could be no damages beyond. Upon these principles, which are elementary, when the orator has recovered and received satisfaction for the tort committed by the sale and

> conversion of so much of its property, its title to so much of its property will have passed, and no damages could accrue to it on account of further use of that property. By the satisfaction the machines would be freed from the orator's monopoly."
>
> *Steam Stone Cutter Co. v. Sheldons,* 15 Fed. 608 (609).

Having in view the origin from which has sprung the action of implied contract for money had and received, it is quite apparent that a lawsuit may not proceed upon both of these theories at the same time, even though under the reformed practice act in effect in the State of Washington, the plaintiff is required to state all the facts going to make up his cause of action.

There are two reasons why it was an error for the trial court to submit the questions to the jury in this form. 1. As previously suggested the proof to establish the different theories is different. 2. The measure of damages is different.

It is the universal holding of the cases that in such a situation as this a suit upon an implied contract waives the damages by reason of the tort and, as a correlary to that, a suit upon the tort waives any claim upon implied contract. In the one form of action the plaintiff relies upon the wrong which has been done him and sues to recover his damages. His recovery in this case is measured by the amount of his loss and the question as to whether or not the defendant has benefited by the

wrong is not material. If he sues upon the implied contract he necessarily affirms and adopts the act by which the defendant has been enriched at the plaintiff's expense and in this case the plaintiff is entitled to recover the amount by which the defendant has been so enriched. There can be no recovery, however, both for the damages and for the amount of the enrichment, which is quite apparent.

It will be observed that by the instruction criticised in Specification of Error 3, the jury at its election was permitted to return a verdict against Plaintiff in Error either on the theory of tort, or money had and received. In the *Western Assurance Company v. Towle,* 65 Wis. 247, the court held that the action was brought on the theory, first, of money had and received, in that it was claimed that the plaintiff had fraudulently made misrepresentations as to the amount of loss by fire; and, second, on the theory that the defendants, who collected the insurance, had themselves destroyed their own property. The case was submitted to the jury on both theories. The court at page 257 says:

> "As there was a general verdict only in the case we can not determine whether the jury found in favor of the plaintiff for the whole amount paid by plaintiff upon the policy, on the ground that the fire which caused the loss was set, or caused to be set, by the defendants themselves, or by one of them, or upon the

ground of fraudulent and false proofs of loss in over-valuing the property destroyed by fire.

"Had there been no proof which would have justified the jury in finding that the defendants, or one of them, set fire to the insured property and so caused the loss the verdict should have been, not for the whole amount of money paid by the Company for the supposed loss, but for so much only as the amount paid exceeded the actual loss sustained by the insured. The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendant, they can only recover back so much as in equity and good conscience they ought not to have paid."

In the case of *Gabrielson v. Hague Box & Lumber Company,* 55 Wash. 342 (104 Pac. 635), the action was brought on a contract on two theories of recovery, first, damages for its breach; and, second, upon a *quantum meruit.* The case was tried and submitted to the jury on both theories and a verdict returned in plaintiff's favor. The court at page 345 says:

"* * * These questions would more properly be for the jury, if submitted under issues properly framed, and would not be considered by us but for the reasons to which we shall presently advert. It is the privilege of a party to have his cause submitted to a jury upon a distinct issue. It is the duty of the court to exercise its judgment and see to it, although the pleadings had tendered an unwarranted issue, that an issue unsustained is not left to the jury for its consideration. To prevent

> situations such as we have here is one of the purposes underlying the reform method of pleading. A person can have but one cause of action arising out of the same subject-matter, and this he must state in plain and concise language and without repetition * * *."

Continuing, the court at page 346 says:

> "* * * The court, however, not only did not withdraw the second cause of action from the jury in so far as the logs and the logging road were concerned, *but left it to the jury to determine whether one or both causes of action were before them, and upon this to fix the amount of recovery. It was left to the jury to determine the issue as well as the fact.*" (Italics are ours.)

If Defendant in Error should contend that the complaint was not drawn upon the theory of tort, or that the case was not tried upon such theory, it is quite apparent that such contention would be without merit. A tort, in its generally accepted term, is the breach of an obligation, or duty, imposed by law. It is sometimes defined as a wrong independent of contract, but this is not entirely accurate since a contract may give rise to a legal relation in which a duty rests upon one or the other as a matter of law, and the breach of this duty will then be a tort; such is the case here. By virtue of the contract pleaded in the complaint (if such contract existed) Plaintiff in Error became the agent of the Defendant in Error. This relation is governed by certain principles of law, one

of which holds the agent liable in case he takes any unfair advantage, or by concealment, profits at the expense of the principal. The breach of this duty is a tort, notwithstanding the fact that the relationship grows out of a contract.

> "The exclusion of proof of the contract for re-establishing the depot, and the willful and intended breach of that contract, brings up for our consideration the question principally argued. * * *
>
> "We are forced back, therefore, to the contract for re-establishing the depot and its breach as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a neg-

ligence which, at bottom, makes the breach of contract actionable as a tort. (*Coggs v. Bernard,* 2 Lord Raym, 909; *Orange Bank v. Brown,* 3 Wend. 161, 162.)"

Rich v. New York Cent. & Hud. River R. R. Co., 87 N. Y. 394.

"Nevertheless it is the contract, without which the relationship could not exist, which brings these rights into existence; and the rights and duties vary with the contracts. Thus a railroad company owes one set of duties to the person in its contract to carry a passenger, another to its employe, and a still different set of duties to a person with whom it has no contract. The same principle applies in a large measure to the reciprocal rights and duties of physicians and patient, attorney and client, owner and architect or contractor, and in many other cases, as a telegraph company and the sender of a message, an vendor and vendee, a bank and a depositor, and the like. There is a body of law outside of the agreement of the parties prescribing rights and defining duties not directly contemplated by the parties, but a breach of which is actionable as a tort."

Jaggard on Torts, Vol. 1, page 23.

As is pointed out heretofore, the measure of damages when the action is on implied contract is different from the recovery permitted where the action is brought for the tort, but notwithstanding this the fraud or wrong involved is a necessary element to establish recovery upon the implied contract.

"Mere complicity in a forgery or other crime does not, as matter of law, render every guilty

> party liable in a civil action, *ex contractu,* for money had and received, or as borrowers, to every person who has been defrauded of money by means of such crime. To charge a party in an action of that character the receipt of the money by him, directly or indirectly, must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds."
>
> *National Trust Co. v. Gleason et al.,* 77 N. Y. 404.

Even if this court could say that the action did not sound in tort as the issues were framed in the complaint, the result would be the same. The case was submitted by the District Court to the jury on both theories, tort and money had and received. This appears from the several instructions criticised, and particularly from the one incorporated in Specification of Error 3.

3. If it was proper under the pleadings and evidence to submit this case to the jury on the theory of money had and received, there is still a further question as to the correctness of the instructions.

It will be observed that in submitting the case on the tort theory, the District Court incorporated the element of "equity and good conscience" (Specification of Error 1). However, in submitting the case on what we conceive to be a theory of recovery for money had and received, the District Court

eliminated all questions of "equity and good conscience."

> "An action for money had and received is an equitable action governed by equitable principles and in it plaintiff waives all torts, trespasses and damage. It may in general be maintained whenever one has money in his hands belonging to another, *which in equity and good conscience he ought to pay over to that other. But where money is paid to a person he receives it with a good conscience, and uses no deceit or unfairness in obtaining it, assumpsit for money had and received will not lie to recover it,* even though it was paid by mistake; nor will the action lie where plaintiff upon the same transaction, would be liable to a cross action to recover damages to an equal amount." (Italics ars ours.)
>
> 27 *Cyc.* 849.

> "* * * The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants they can only recover back so much as in equity and good conscience they ought not to have paid."
>
> *Western Assurance Co. v. Towle,* 65 Wis. 247 (257).

4. It will be observed that in each of these instructions referred to in Specification of Errors 2, 3 and 4, the District Court has used practically the same language. If the instructions were proper, a repetition could have had no effect, but to unduly impress upon the mind of the jurors the thought that the District Judge considered this

element of great importance, and desired to impress that thought firmly in the mind of the jurors. It could not have been otherwise than highly prejudicial to Plaintiff in Error.

> "Instructions should be plain, easily understood by the average mind, and concise. * * * The purpose of instructing a jury is to aid them in arriving at a proper verdict, and in order to accomplish the desired purpose instructions should not be repeated, but when once given, presenting a particular theory of a case, no other instruction should present the same theory, as this would destroy their very purpose and mystify, confuse and mislead the jury. * * * Nor should statements of the law applicable to the case be given undue prominence by repetition or otherwise."
>
> 14 *R. C. L.* 778, and cases cited.

In *New York L. E. & W. R. Co. v. Winters,* 143 U. S. 60 (36 L. Ed. 71), the court at page 80 of the Law Edition says:

> "What we have said above virtually disposes of these requests. In so far as they are correct, the substance of them had been given by the court in its general charge, and there was no error, therefore, in refusing to give them in the language requested. * * * In fact, it is much the better practice to refuse to give instructions to the jury, the substance of which has already been stated in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law; for a multitude of instructions, all stated in different language and meaning the

same thing, tends rather to confuse than to enlighten the minds of the jury."

In *Chicago M. R. Co. v. Alexander,* 47 Wash. 131 (91 Pac. 626), the court says at page 138:

"Appellant contends that the trial court erred in unnecessary repetitions of its instructions, especially of those favorable to respondents. It contends that such action had a tendency to place undue and particular stress upon such instructions, was prejudicial to appellant, and constituted reversible error. The instructions were frequently and unnecessarily repeated. In view of the new trial to be granted herein, we will state that such a course should be avoided by trial judges. In *Meachem v. Hahn & Co.,* 46 Ill. App. 144, 149, the court, commenting on repeated instructions, well said:

" 'Counsel may select the strong and salient points appearing, and seek in the argument to direct the thought of the jury to them as being the important and controlling features of the case, but the instructions of the court should not be made the medium for conveying such views to the jury.'

"Although a judgment might not in every instance be reversed for such unnecessary repetitions, it might in furtherance of justice sometimes become necessary to grant a reversal. 1 *Blashfield, Instructions to Juries,* Sec. 108; 2 *Current Law,* 470."

III.

Specification of Error 5.

This specification of error has to do with the only question involved in this case which is not

involved in the Hample case. After Defendant in Error contracted to sell his stock to Armour & Co. on May 21, 1917, his stock was deposited with a bank at Butte, as required by the contract. Armour & Co. did not comply with its part of the contract within the time stipulated, and after a default had occurred for several days Defendant in Error withdrew his stock from the bank. (Trans. 58.) While the situation remained in this condition, Defendant in Error, on June 4, 1917, wrote Armour & Co. as follows:

> "I took the stock out of the bank eight days later than the appointed time. I want to sell my stock but want the same price that Mr. Stanton gets for his. I don't want Mr. Stanton to make $25.00 per share on my stock. He told Mr. Hample and myself that Two Hundred ($200.00) Dollars per share was the limit you would give and we were getting exactly the same as he was. I now find out through Mr. Fred B. Grinnell of Spokane, that he had an option from Mr. Stanton on my stock, Two Hundred Twenty (220.00) per share, that is, an option on five thousand and eighty (5080) shares at that price, and your Company was willing to take the said stock at said price. Mr. Stanton obtained permission to sell my stock by false representations and fraud of the worst kind. I am willing to let your Company get this stock if you want it at the price you pay for Mr. Stanton's stock." (Trans. 61.)

Subsequent to making his contract on May 21 with Armour & Co., Defendant in Error himself, purchased the stock in E. H. Stanton Co. owned

by the Overholt Estate, 773 shares, at $190 a share. (Trans. 119-120.) Defendant in Error, in his letter to Mr. Kizer of June 14, 1917, said:

> "I was informed that Mr. Good wanted an option on the Overholt stock at Two Hundred ($200.00) Dollars. He is with Wilson & Co. I suppose Armour & Co. will not want to buy that stock for a year, as Mr. Stanton has that time to deliver it to them. If that is not the case, you know where the stock is." (Trans. 66.)

Thereafter, and on or about the 23rd day of June, 1917, Defendant in Error delivered to Armour & Co. the 1096 1/3 shares involved in this action and the 773 shares acquired from the Overholt Estate.

From the above it appears that Defendant in Error at least as early as June 4, 1917, had as much information, on which complaint could be made, as he had at any time. He then had the understanding that Plaintiff in Error had profited through the sale of his stock, and that such profit was $25 a share; that Plaintiff in Error had received more than $200 a share for his own stock and had an agreement with Armour & Co. whereby that Company was to purchase any other stock which Plaintiff in Error might obtain within a certain time at $220 a share. If, therefore, Plaintiff in Error made any profit on Defendant in Error's stock, or had sold his own stock for a higher price than Defendant in Error had received, it ap-

pears that Defendant in Error was now advised of such situation. Based on this condition of the record, Plaintiff in Error submitted his fifth requested instruction (Trans. 26) which was given in a modified form by the District Court, and this action is the foundation of Specification of Error 5.

We submit that it was error in the trial court to qualify the said instruction by the addition of the part italicized in the Specification of Error 5. It clearly appears that Defendant in Error had repudiated his contract and retaken his stock under the same claim that he is now making, namely, that Plaintiff in Error had violated his agreement, and that there had been fraud and misrepresentations. It was wholly immaterial to this question whether Defendant in Error in subsequently delivering the stock to Armour & C. did so pursuant to the original contract, or a new and independent contract.

It is difficult to understand how it could be said that the Defendant in Error was delivering his stock pursuant to the contract entered into in Spokane, in view of the evidence. It cannot be doubted that if the Defendant in Error had rescinded the contract first made, that he must of necessity delivered his stock under some new agreement, and whether the amount of consideration therefor was the same, or different, is immaterial.

The Defendant in Error had placed his stock in the bank pursuant to the contract, but Armour &

Co., through an oversight, failed to deposit the notes and money as they were required to do. Thereupon the Defendant in Error withdrew his stock and he was fully justified in doing so, and by that act the contract entered into came to an end. This is the construction which he placed upon it at the time, after having secured legal advice as to his rights. (Trans. 61.)

On June 4th he telegraphed to Mr. Robbins as follows:

> "Your failure by ten days to comply with contract releases me. See letter copy sent." (Trans. 59.)

In the letter mailed to Armour & Co. of the same date he said:

> "I am willing to let your company get this stock if you want it at the price you pay for Mr. Stanton's stock." (Trans. 61.)

In his letter to Mr. Kizer, dated June 14th, he said:

> "* * * They can buy it from me as cheap as they did from Mr. Stanton. I want them to get the stock if they want it and will not sell to any of their competitors. If I don't sell to them, I will be their partner." (Trans. 66.)

The foregoing statements by the Defendant in Error are ample evidence that he did everything in his power to terminate the contract, and that he fully intended to do so, and that so far as he was

concerned the contract was completely at an end. The law upon this question is well settled.

> "323. Effect of Rescission. — Generally speaking, the effect of rescission is to extinguish the contract. The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. Accordingly, it has been said that a lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of the contract.
>
> 6 *R. C. L.* 942.

> "Generally speaking a rescission abbrogates the contract, not partially but completely, and after a binding election to rescind a party cannot insist on rights thereunder, but each of the parties is returned to his previously existing rights."
>
> 13 *C. J.* 623.

> "If the contract was then broken that was the time for the plaintiff to have exercised its right to election as to whether it would go on under the contract or treat it as rescinded, and, having chosen the former course, it is now too late to adopt the latter." (393.)
>
> *Fore River Ship Building Company v. Southern Pacific Company,* 219 Fed. 387.

The case of *Hays v. City of Nashville,* 80 Fed. 641, involves the question of rescission, and the distinction between rescission and abandonment. The court, speaking through Judge Taft, says:

> "It is well settled that a technical rescission

of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandoncent to look to the contract to detercine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment." (645.)

"It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real intention is only to declare his release from further obligation to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases, courts consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used." (646.)

In the instant case Defendant in Error cannot possibly contend that he elected to consider himself released from the contract and to hold Armour & Co. for damages. On the contrary it is apparent from all the evidence that he intended to rescind the contract so far as he possibly could and

to sell his stock to Armour & Co. together with the Overholt stock which he had purchased, for as much money as he could get irrespective of the old contract. Moreover, he was claiming the right to rescind not only because Armour & Co. had failed to comply with the agreement, but because he claimed someone had informed him that Stanton had gotten more money than he, Defendant in Error, had received, and that fraud had been practiced upon him. When he sold his stock to Armour & Co. it was clearly his intention to recoup his damages by selling at the advanced price, which he did. (Trans. 120.)

But, if it can be said that there was not a completed rescission, and Defendant in Error did not make a new contract we think the result must be the same. It will be observed that Defendant in Error, in his communications to Armour & Co. claimed a right to rescind, not only on the ground that payment had not been made as stipulated, but likewise on the ground that Plaintiff in Error was his agent in making the sale, and had been guilty of fraud and misrepresentations in the premises. The correspondence shows that he had at this time as much knowledge concerning the facts as he had when this suit was brought. He further testified, on the trial of this case, that he notified Armour & Co.'s representatives prior to making the original sale that Plaintiff in Error was acting for him, and that he was to receive the same

for his stock as Plaintiff in Error (Trans. 69-70). If this is true, and he is bound by his testimony, then he had a perfect right to rescind the contract as against Armour & Co., which had been done. Under the testimony of Defendant in Error, Armour & Co. also knew, if it was a fact, that a part of the purchase price of Defendant in Error's stock had been paid to Plaintiff in Error. Armour & Co. knew not only that there had been a violation of the agency, but that a fraud was being committed on Defendant in Error and were in no better position than was Plaintiff in Error. Defendant in Error's right to rescind under his evidence was complete and he exercised his election, and could not subsequently deal with Armour & Co., either by a new and independent contract, nor by permitting Armour & Co. to exercise any rights, which it claimed under the original contract.

IV.

Specification of Error 6.

It follows from what has been said above, if our contentions are sound, that the evidence did not warrant a judgment in Defendant in Error's favor, and that in any event prejudicial errors were committed by the District Court, and the judgment should not have been entered. We have already discussed all questions leading up to the entry of judgment, and it will not be necessary to repeat.

$25,000 *Note Transaction.*

Since it is doubtful whether Plaintiff in Error will have an opportunity to file a reply brief in this case, and Defendant in Error may in his brief claim that the $25,000 note transaction has some bearing on this case, we have deemed it advisable ourselves to refer to the evidence. This note transaction, however, in our opinion, has not the slightest bearing on the questions involved on this Writ of Error.

E. H. Stanton Company was incorporated in 1904 and had conducted a highly prosperous business, with the result that at the time of the sale of stock to Armour & Co. the net value of the business was approximately $1,250,000. The corporation was organized by Plaintiff in Error, he at all times was its President, General Manager, and had nearly exclusive control of the conduct of the business. (Trans. 102.) Hamilton, Hample and the Overholt Estate were the only other large stockholders. Hamilton and Hample lived in Butte and once or twice a year would visit the plant for a day or so, and in the month of January each year would receive the annual statement of the business of the corporation, which was forwarded by Plaintiff in Error. (Trans. 51, 102.) During all these years Plaintiff in Error's salary was $300 a month, which manifestly was very inadequate compensation for such services in a corporation of that size. Plaintiff in Error was indebted to the corporation on a

note for $25,000, of which note Hamilton and Hample had knowledge. (Trans. 50, 53, 102.) The sale made by Hamilton and Hample of their stock to Armour & Co. was on May 21, 1917. (Trans. 50, 53, 56, 102.) On Saturday, May 19, 1917, the Trustees of E. H. Stanton Company (Hamilton and Hample being present and consenting) passed a resolution cancelling this note "as additional compensation for services rendered to E. H. Stanton Co. since 1905." (Trans. 74.) The representatives of Armour & Co., before they purchased the stock of Plaintiff in Error, Hamilton and Hample, had knowledge of the cancellation of this note. (Trans. 56, 90.) Hample, in testifying concerning the note in connection with a claim of Grinnell for commission, said:

> "He" (Stanton) "said it would not amount to anything, and that if he had to pay any commission it would come out of him; he had planned to cover it from the notes and automobiles that he had received, that he was to have, meaning the $25,000 note. That is the only time commissions were ever referred to." (Trans. 50.)

Hamilton testified:

> "When Mr. Hample and I and Mr. Stanton and Fred Stanton were out at Mr. Stanton's residence this question was brought up and it is my recollection that Fred Stanton drew up a resolution with a pencil and paper. I am not sure that he signed it that day. It was passed and signed either Sunday night or Monday. I think the automobile was in the same

> resolution, but I am not sure. I think he said that the reason for releasing this was that Mr. Stanton might have some commission to pay and Mr. O'Hern told me that we could put that in as commission, compensation or anything we might think reasonable. He said we would have to assign some excuse." Trans. 54.)

The same witness further referring to the same matter testified that on Saturday morning (June 19) he met Mr. O'Hern and O'Hern said:

> "He told me that Mr. Stanton was very unreasonable; that he wanted too much. He wants a whole lot of things that is unreasonable. He wants his note cancelled and he wants an automobile. He says, 'If you people do come to a deal you can do that, but the old board would have to do it,' and I says, 'I figure that would amount to about $30,000.'" (Trans. 56.)

Further the witness testified in referring to Grinnell:

> "Anyway, Mr. Stanton said this man thought he ought to have some commission and that he was taking care of that, that it wouldn't cost us anything. He did not mention commission at any other time." (Trans. 57.)

The witness repeats the substance of his conversation with O'Hern at pages 69 and 70 of the Transcript, and then proceeds to say:

> "I know this resolution in regard to the note was drawn up at Stanton's house and I may have signed it there." (Trans. 70.)

O'Hern testified concerning this subject as follows:

> "That among the notes payable was an item due by Stanton to the Company for $25,000.00. The old directors of the Stanton Company voted to release him from it, to cancel it." (Trans. 90.) "That he meant the meeting was held previous to the trade." (Trans. 91.)

Plaintiff in Error testified on this subject as follows:

> "On Saturday afternoon while Hamilton and Hample were in Spokane I told them I would like to have the note cancelled because they could sell their stock for just as much money with that note cancelled as not. I told them that I worked pretty hard and I had been successful and had made them quite a lot of money, and they said it was absolutely all right with them.
>
> "I talked it up with Fred and he talked it over with Mr. Hamilton and Mr. Hample and drew up a resolution which was passed before Armour & Company knew anything about it." (Trans. 107.)

In the above quoted evidence (and we have intended to quote all bearing on this question) we find nothing which has any bearing on any question involved in this case.

We, therefore, submit from any viewpoint of this case there has been a miscarriage of justice, and if we are entitled to urge that question (no motion for non-suit having been made in the lower

court), that judgment should be directed in favor of Plaintiff in Error; but in any event, for the errors above discussed, the judgment of the lower court should be reversed.

Respectfully submitted,

JAS. A. WILLIAMS,
DANSON, WILLIAMS & DANSON,
Spokane, Washington,
Attorneys for Plaintiff in Error.